UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM,

Plaintiff,

v. 11 Civ. 733 (WHP)

BANK OF AMERICA CORPORATION, et al.,

Defendants.

----------x

July 26, 2013
11:15 a.m.

Before:

HON. WILLIAM H. PAULEY III

District Judge

APPEARANCES

BARRACK, RODOS & BACINE
Attorneys for Plaintiff
BY: MARK R. ROSEN
JEFFREY A. BARRACK
JEFFREY B. GITTLEMAN

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
Attorneys for Defendant Bank of America Corporation
BY: SCOTT D. MUSOFF
DAVID E. CARNEY

DLA PIPER, LLP (US)
Attorneys for Defendant Brian T. Moynihan
BY: JEFFREY D. ROTENBERG
JOHN M. HILLEBRECHT

APPEARANCES (CONT'D)

DECHERT, LLP
Attorneys for Defendant Charles H. Noski
BY: ROBERT J. JOSSEN
KATHERINE K. RANKIN

DAVIS, POLK & WARDWELL, LLP
Attorneys for Defendant Neil Cotty
BY: LAWRENCE J.PORTNOY
BRIAN M. BURNOVSKI

DEBEVOISE & PLIMPTON, LLP
Attorneys for Defendant Kenneth D. Lewis
BY: ADA F. JOHNSON

BAKER BOTTS, LLP
Attorneys for Defendant Joseph L. Price
BY: MELISSA J. ARMSTRONG

(In robing room; all counsel appearing via telephone)

THE COURT: Good morning. This is Judge Pauley. You're on a speakerphone in my robing room and a court reporter is present recording what is being said.

We have the appearances of counsel, and I am going to ask each attorney to identify themselves each time they speak so that we can maintain a coherent record here and I will know who is talking, as will the court reporter.

Mr. Rosen, are you there?

MR. ROSEN: Yes, your Honor, I am.

THE COURT: Now, I have received the parties' proposal.

First, where are the parties with respect to discovery on class certification?

MR. ROSEN: Your Honor, we served document requests on both Bank of America and the individual defendants, and we have served some subpoenas on nonparty defendants. Previously we had served, with your Honor's permission as you will recall, document preservation subpoenas, and then after we passed the latest hurdle with the motions, we served substantive subpoenas on those parties.

We have now had three meet and confer sessions with counsel for Bank of America concerning their document production. My understanding is that they are going to be producing documents to us, although to date we have only

received a handful of organizational charts, but they are working diligently, they assure us, to get the documents to us. Probably Mr. Musoff will be best to describe the exact status of where they are, but we have done that.

We have not yet gotten documents from the other defendants, although we think it makes more sense to first resolve the issues with Bank of America. And we have also had some meet and confer sessions with some of the nonparty respondents to our subpoenas. But to date we have not received anything on class certification other than a handful of organizational charts.

THE COURT: Why do you believe that you need till February of next year to complete class certification discovery?

MR. ROSEN: Your Honor, here is the thinking that went into this. The reality is the most substantive briefs on class certification are not the opening brief that we would file.

THE COURT: Certainly not the way you have organized this schedule, which I might as well tell everyone right now, I am not going to entertain a motion schedule like you have proposed. You are putting the cart before the horse. That notice of motion will be just pure boilerplate off the shelf, and you're right, nothing will get specific until around the time of the replies six months later.

MR. ROSEN: Your Honor, let me explain why we did what

we did, and we negotiated with defense counsel and we all agreed to it. That's not simply plaintiffs' proposal, it's everyone's proposal.

Before we submitted the proposed schedule to the Court, we reached out to defendants just to see if there were any issues related to class certification that they would be willing to either stipulate to or narrow, and they respectfully exercised their rights and said they were not prepared to stipulate to any of those issues at this time. So it's obviously incumbent upon us as the proponents of class certification to meet our burden. Although your Honor is correct to a large extent the opening briefs will be boilerplate, we are going to be submitting expert declarations, or a declaration at least with respect to some issues in class certification that we think we are required to under the current state of the law.

So recognizing that the meat of the briefing is the defendants' opposition, the defendants wanted 12 weeks and that takes them -- and the reason we were starting with our opening brief going in September 20 rather than earlier is the last couple of weeks in August people tend to be away for family vacations, that's when their kids are out of camp and they are able to get away. Frankly, the period immediately after Labor Day is the Jewish holidays when a number of lawyers in my office will be away for that reason. Therefore, we just

thought it made more sense to have our opening brief to go in on the 20th. But the defendants wanted 12 weeks, if we start on the 20th of September, which will give them to December 13.

And we wanted as much time as defendants, but agreed to a shorter period of 11 weeks, so ours would go in February 28, recognizing that immediately after their briefs go in and defendants can take their well-earned Christmas break, it would be tough for us to get a lot of work done because many of the people will be unavailable, certainly experts and other people we would want to consult with, it's going to be tough to reach those people too. So we proposed 11 weeks for our reply. The reality is it's probably nine effective weeks because the last two weeks of December it's hard to get anything done, reaching people and that sort of thing.

At that point, your Honor, you should understand plaintiffs and defendants would be deposing each other's class certification experts. So defendants would give us, presumably with their opposition papers on December 13, one or more expert declarations, and we'd want to be deposing them. Then we would expect that we would have to do reply declarations, either from our opening expert or other experts, and they'd want to be deposed all of those folks. So that would be an additional obligation during that process.

Your Honor, we certainly are sympathetic to the idea of moving class certification as rapidly as possible. We just

think the practical logistics would make it difficult to make the schedule significantly shorter than what we have laid out, but your Honor may want to hear from the defendants on this as well.

THE COURT: Mr. Musoff.

MR. MUSOFF: Thank you, your Honor.

The defense view was as soon as plaintiffs, and we were hoping it wouldn't be boilerplate, were able to move the class certification with whatever support they have, expert or otherwise, documentary or otherwise, we would then want an opportunity to take depositions of their experts, take a deposition of the lead plaintiff itself, and then submit an opposition, if any, after assessing their motion and their evidentiary and record support for class certification.

So it really all triggered off of the date by which plaintiffs were able to put in their class certification motion with support. And again, our hope was that it wouldn't be boilerplate. We have had this in other cases, not with these plaintiffs' firms, where the first motion was boilerplate, and then in reply new evidence was put in, and we have had courts provide us the opportunity to then put in a response to that. So we are hoping we are hearing today that the plaintiffs do intend to support their motion with experts and otherwise.

So the thought was then having an opportunity to assess what they submit, then do depositions within 30, 45 days

of their motion, and then gather any rebuttal experts that we would have and submit an opposition, if any, depending on what support they have and what their motion looks like and the like.

THE COURT: Anyone else want to be heard on behalf of the defendants?

All right. Silence is golden.

Mr. Rosen, when are you prepared to submit a motion that's not boilerplate?

MR. ROSEN: We would hope the motion would not be boilerplate, but we have just started working with an expert. Obviously, there are going to be issues.

THE COURT: Why don't you conduct some discovery and inform your expert and take the discovery now, and I will fix a date. You tell me when you think you will have had enough discovery that you can file a motion for class certification that will be meaningful and tailored to this case.

MR. ROSEN: Your Honor, part of my difficulty in giving you a definitive response, as much as I would like to, is that we haven't yet had any discovery other than the defendants' organizational charts. And I say that not to criticize the defendants. I know Bank of America has been in a number of cases, and they have lots of demands on their time and their counsel's time. But my understanding of the way discovery was intended to proceed, and typically proceeds, is

first you get documentary discovery and then afterwards you take depositions.

It's my understanding from speaking with my colleagues, who are on the phone, as recently as yesterday with attorneys from Skadden, that it all depends on when they are going to give us their response. They had originally hoped to get us several million pages of documents already, and they have advised us there have been technical and human issues that delayed them. I assume that's an absolutely honest and truthful statement and I am not challenging it, but until we get some documents, we don't know how to proceed.

Let me just give your Honor a taste of one of the issues or simplest issue. I would have hoped that, if nothing else, they would have stipulated to numerosity; not just Bank of America, but all of the defendants would have stipulated to numerosity of the class. And when I sent them my e-mail on July 2, I listed the six issues which are typically present in class certification -- namely, commonality, numerosity, adequacy, typicality under 23(a), and superiority and predominance under 23(b)(3) -- I would have thought at a minimum they would have stipulated to numerosity, and yet they have declined to do so.

We are obviously going to have to submit expert evidence concerning market efficiency, if not on other issues. But for us to give a substantive response, we need to know what

issues they are going to be challenging and that still stands in front of us. And, of course, although we are talking about what we are getting from the defendants, defendants, although they say they want certain discovery, they have obviously not served any discovery on us yet.

MR. MUSOFF: None of the meet and confers and document requests and discovery that we have been talking about, and we do intend to begin a rolling production of millions and millions of pages of documents within the next couple of weeks, but their requests are directed towards the merits and not class discovery. 73 requests purportedly beginning to seek information, which we are still meeting and conferring about, beginning nearly two years before the class period even begins. So none of the discovery that we are about to produce relates in our view to class certification. Plaintiffs haven't focused or directed us to any discovery they need to make their class certification motion from the defendants as opposed to relating to the market and market reactions and things like that.

In terms of the request to stipulate to things, again, a lot of it may depend on the nature of their motion. We have seen motions in the past where people have brought in the types of securities sought there. We hope that doesn't happen here. But it is difficult to stipulate before we see in writing what their proposed support is for their class period and what it's like. And I think that plaintiffs and defendants know that

there are only going to be a few areas that are going to be of potential disagreement on class certification, and I think numerosity is probably not one, and I don't anticipate that they are taking much discovery, if anything, on the numerosity front.

MR. ROSEN: To briefly respond to Mr. Musoff's comment. The only class of securities that are covered by this is common stock. During the class period, Bank of America, I believe in December of 2009, issued what were called common equivalent securities, which automatically converted during the class period, in February of 2010, into common stock. Obviously, given that this is not a series of rolling disclosure or partial disclosure through the history of the class period, but a single set of disclosures at the end, anyone who bought the common equivalent securities that did not hold it until the end, and certainly past the date when it converted to common stock, would not be part of the class, and therefore it's only going to be involved with basically common stock and the common equivalent that converted to common stock. The class definition is set forth in our amended complaint, which your Honor sustained, obviously not ruling on the merits, but your Honor sustained the legal sufficiency of those claims, and the class period is set forth in that document.

So the parameters of the class are clear. We are not trying to sue on behalf of bonds or anything else. It's pretty

straightforward. But, unfortunately, defendants have elected to exercise their absolute right to require us to establish every single element with respect to the class motion.

Finally, with respect to Mr. Musoff's comment about the focus of our document request, it is my understanding that your Honor did not want stages of discovery first on class and then on merits, and your Honor said, if I recall correctly, that you did not want a witness deposed twice, once on class and once on merits. So we have been trying to address all of it at once because we thought that would be the most efficient way to proceed. If your Honor has a better suggestion, we of course are receptive to that.

THE COURT: I am not bifurcating discovery here between class and merits discovery. But it seems to me that the parties have got to get focused on it. So I am going to fix a schedule that will make all of you unhappy, but make sense to me. There may be plenty of judges around who like to see boilerplate motions. I am not one of them. It's a waste of my time.

You better get cracking on discovery. And you better focus on some of the issues that are going to frame your class motion. I am going to require the plaintiffs to file a meaningful class certification motion, not an initial salvo to be refined on reply, but a meaningful motion by November 15. And the defendants will oppose the motion by December 20. I

will take a reply on January 10. And I am going to hear oral argument in the case on January 31. That's how we are going to handle that.

Now I am going to turn to the number of depositions in the case. I see that virtually no progress has been made since we had the conference on May 20. So it's as simple as this. I have looked at what you have submitted. It's my view not that I fix a number of depositions, but that I fix hours of deposition. And so I am going to provide that each side has a total of 250 hours of deposition in the case. Use them however you want.

MR. ROSEN: Can I ask a question of clarification?

THE COURT: Yes.

MR. ROSEN: If plaintiff notices a deposition that takes X hours of deposition of a particular witness and the defense counsel then starts examining that witness, does that count against the defense counsel's 250 hours?

THE COURT: Yes. It counts against the questioner.

MR. ROSEN: OK.

THE COURT: If you want to burn up 20 hours on some third party witness that the defendant calls, that's your business.

MR. ROSEN: Very well, your Honor. Thank you.

THE COURT: 250 hours each. That's it. And when I say each for the defendants, I mean collectively.

MR. MUSOFF: Yes, your Honor.

THE COURT: Now, are there any other burning issues at the moment because I am going to incorporate the scheduling, and I will fix a time for January 31.

MR. ROSEN: The one other area of disagreement that we had flagged in the joint report was the length of depositions. Plaintiffs' feeling was that there would be at least some depositions where we might need to take more than one day of examination, and especially in light of the fact that your Honor has just put the limit in terms of hours rather than number of depositions, we would respectfully suggest the most logical thing is to say, you can go more than one day if the clock is running on the party who is questioning that witness, rather than have an absolute limit of one day for every witness, certainly as it relates to the individual defendants and some of the other significant witnesses.

THE COURT: I largely agree with that, but first I think if a party believes they are going to use more than one day for deposition, that first they should alert the other side about that. And if a party believes that they are going to take a deposition for more than two days of a witness, the parties have an opportunity to bring that matter to me to be resolved. But I expect the parties to work together, and if you wind up spending nine hours in a day on a deposition, I assume that nobody wants to sit around for two days when you

can finish it in one day.

MR. ROSEN: Just a point of clarification with respect to your ruling. If plaintiffs intend to examine a witness for a day and a half, and defendants say they might take that witness collectively for one day, would that be something that we would then need to refer to the Court?

THE COURT: No. You will have reached an agreement. I just don't want any party sandbagged where they have told their client this deposition will likely be concluded in a day, and then people arrive and there is no intention of completing the deposition in a day, and people are inconvenienced, or clients come to view lawyers as not being forthright with them in what is going on in the case. That's all.

MR. ROSEN: Thank you, your Honor.

THE COURT: Anything else?

MR. MUSOFF: Not from the defendants, your Honor.

THE COURT: January 31, 11:00.

MR. ROSEN: Is that the date for our argument on the class motion?

THE COURT: Yes.

MR. ROSEN: One other suggestion I would make to your Honor, if your Honor would be interested in considering it, is perhaps you could encourage the parties to meet and confer about the class motion, both the scope and any issues, at least 30 days, maybe 45 days before the deadline for plaintiffs'

opening brief, and see if the parties can narrow the issues and flag the issues, without prejudice, that they think would arise.

THE COURT: Given my experience so far in this case, I think it's a great suggestion, and I am going to add one more thing to it. On October 31, the parties are going to submit another joint report to me on precisely what they believe the contours of the class certification motion are going to be. So if numerosity is still unresolved in the case, maybe we will just resolve it right then, after I see the report, and we will have a conference.

MR. ROSEN: I think that would be very helpful, your Honor.

MR. MUSOFF: We look forward to that. As I thought I indicated before, any opposition will depend on what they say, and if there isn't one, we are certainly not going to go through the motions. We just ask, if we are submitting a joint report by October 31, that the plaintiffs be in a position sufficiently in advance of that to substantively discuss their upcoming motion for class certification, including their expert views and things like that, and we are happy to reach agreement on as much as we can.

THE COURT: And those kind of discussions should be occurring earlier in October so that you can prepare a joint report. Because then you will be beyond summer camp and the

Jewish holidays, and we won't yet be to the end of the year when nobody else is working, I guess, except federal judges, but we will probably be sequestered by then so it won't matter anyway. Sequester is coming. From what I am hearing, it's going to have a profound impact on the administration of justice, especially civil cases. So I intend to keep this case moving.

MR. ROSEN: On behalf of the plaintiffs, we very much agree with and appreciate your Honor's approach on this.

THE COURT: Flattery will get you everywhere.

Have a great weekend, gentlemen.

(Adjourned)